

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S REPLY
BRIEF**

77-1346
Extraditable
HAS CONTENT

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Appellee,

-against-

JOHN DAVID HUGHEY, III,

Appellant.
-----Y

B
P/S
Docket No. 77-1346

REPLY BRIEF FOR APPELLANT



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EQUITY LEGAL BOND

Crane

RAC CONTENT

ARGUMENT

In an attempt to avoid the consequences of Judge Pollack's failure to include a purge clause in sentencing Hughey for contempt, the government argues that the failure was "inadvertant"* and, therefore, of no legal significance. The government also argues that Hughey (and his counsel) knew or should have known that this failure was inadvertant and that, therefore, Hughey should be bound by what Judge Pollack actually intended. With both of these propositions, appellant disagrees. The absence of an express statement that Hughey could be released from jail if he testified meant that his sentence was definite** and unconditional.

The essential determinant of coercive civil contempt is the contemnor's right to purge the contempt upon

* Government's Brief at p. 18.

**United States v. Hall, 176 F.2d 163 (2nd Cir.) cert.den. 338 U.S. 851 (1949) is ample authority that a sentence "for the duration of the trial" is sufficiently definite to support a judgment for criminal contempt. The government's effort to distinguish this case on procedural grounds (Brief, p. 16, fn.) cannot overcome the explicit language of the court that the sentence imposed was not void because it was indefinite. The fact that the trial judge in Hall eventually filed a certificate pursuant to the Federal Rules of Criminal Procedure 42(a) and that Judge Pollack did not has no bearing on the sentence itself but only on whether it was imposed with proper procedures.

compliance. Shillitani v. United States, 384 U.S. 364 (1966); Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911); Baker v. Eisenstadt, 456 F.2d 382 (1st Cir.), cert. den. 409 U.S. 846 (1972). Without such a right the sentence is, by its terms, not coercive since there is nothing the contemnor can do to comply and guarantee release. In Baker the contemnor was sentenced to a definite term of five months for refusing to testify as a witness. Among the objections raised to the sentence was that, given the nature of the proceeding, the contempt should have been civil and not criminal. Rejecting the argument as "without merit" the court looked directly to the language of the order and found that it lacked "the essential ingredient of a sanction for civil contempt . . . that is, the condition that the contemnor be released if he were willing to testify." Baker v. Eisenstadt, supra at 387. The Baker court cites Shillitani v. United States, supra as support for the proposition that the unqualified right to be released upon compliance must be part of the order of contempt.

This court has the opportunity and obligation to make clear that a purge clause is a necessary and essential element of any civil coercive contempt proceeding and may not be omitted when a district court seeks to coerce testimony from a reluctant witness. Judge Griesse found that no amount

of coercion would have produced Hughey's testimony, a finding which appellant has argued is irrelevant and not supported by the record (Brief, Point III). However, assuming, arguendo, that such a finding could have been made, Judge Pollack may have similarly concluded that Hughey would not testify and sentenced him for failure to comply with the court's order rather than to coerce his testimony. Indeed, both the government and Judge Griesse appear to embrace both sides of a contradiction; that the purpose of the contempt order, which they say is controlling, was to coerce, and that no amount of coercion would have forced Hughey to testify, thus making the purge clause academic. They cannot, appellant would urge, have it both ways.

While the government concedes that it is the record before Judge Pollack which controls the determination of this case, the government nonetheless argues that Hughey and his counsel "knew" that Judge Pollack meant to include a purge clause and that this knowledge, allegedly revealed in the record of the proceedings, is adequate to overcome the defect in the sentence. The government again seeks to have it both ways: first, by implying that in spite of what Judge Pollack said, Hughey and his counsel should be held to knowledge of an implied purge clause. The government places an impossible

burden on both the right to counsel and the power of the court by transferring the responsibility for interpreting an order into hands other than the court's. By this reasoning, if Hughey or his counsel had characterized the contempt in their hurried bail application and appeal papers as a criminal contempt, the question would be disposed of!*

Secondly, the government asserts that by failing to raise the precise question involved in this appeal at a pre-indictment stage (i.e. in the six-months between the contempt adjudication of the Swinton trial and the present indictment), Hughey has waived it. By this reasoning, Hughey and his attorney should have immediately brought the potential defect in the proceedings to Judge Pollack's attention and sought clarification; because they did not, they have waived forever their ability to raise the question. In this context, it must be noted that in the course of warning Hughey and advising him to consult with counsel, Judge Pollack made remarks which appear to be incorrect or imprecise statements of the law. For example, Judge Pollack warned Hughey that the government could proceed in "criminal" contempt against Hughey upon a claim of obstruction of justice and that the

*That counsel's bail application papers indicated an awareness that the government might decide to further pursue Hughey is in no way a concession that counsel believed it properly or lawfully pursued.

maximum term of imprisonment would be eighteen months. In spite of the language of 18 U.S.C. Section 401 that there is no limit on the jail term for violation of the statute, are the court, prosecution and defendant now bound by Judge Pollack's warning? Is the failure to raise the question with Judge Pollack fatal to Hughey's later claim that the sentence upon any conviction on the instant indictment is so limited. Indeed, how is counsel to advise Hughey upon Judge Pollack's "obstruction of justice" remarks?

All of this, of course, is speculation on what may have occurred, based upon an inadequate record. The essential point is that the right to purge is akin to "notice" as required by due process and is a duty and obligation of the court. Counsel is neither permitted nor qualified to substitute his or her interpretation of the law for what the court declares the law to be. In the instant case, counsel representing Hughey before Judge Pollack was relied upon by the court to advise Hughey on one specific legal situation*

*This occurs at App. 6 immediately after Hughey has been granted immunity, over objection to both the form and substance of the immunity grant. The advice contemplated by the court would be with respect to the continued claim of Fifth Amendment protection by the witness. When Hughey was excused following the immunity grant he was told to remain available to be recalled and permitted to remain at his counsel's office in the interim. Judge Pollack makes no mention that he expects Hughey to confer with counsel with regard to anything pending recall to the stand.

and not for the general proposition questioned on this appeal.

The lack of specific notice to Hughey that he had an unqualified right to be released upon testifying is at the heart of this appeal. It is clear that Judge Griese was concerned with this defect, and that this concern led him to inquire of Hughey and his counsel whether they had such notice. It was impossible to establish such a due process violation without further violating Hughey's Fifth and Sixth Amendment rights and the attorney-client privilege. Hughey, or any witness/defendant, can not be forced to elect between constitutional rights* (Simmons v. U.S., 390 U.S. 377, 394 (1968)) any more than he can be burdened with shoring up defects in the government's case. The burden is on the government to show that proceeding with the prosecution of the present indictment will not violate double jeopardy, a fundamental right granted as a limitation on government not on the citizenry.

*Perhaps sensing this problem, the government objected to Judge Griese's holding such a hearing below. It is is ironic that the government seeks to capitalize on Hughey's claim of constitutional and attorney-client privilege at the aborted hearing by making unwarranted inferences from the record on precisely the same factual question.

Respectfully submitted,

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